

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

A Radio Company, Inc.
Licensee of Station WEGA
P.O. Box 1488
Vega Baja, PR 00694
Facility ID # 69853

)
)
)
)
)
)
)

File Number EB-05-SJ-025

NAL/Acct. No.200632680001

FRN 0010555654

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 2007

Released: February 1, 2007

By the Assistant Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we grant in part and deny in part the petition for reconsideration filed by A Radio Company, Inc. ("A Radio"), licensee of AM radio station WEGA in Vega Baja, Puerto Rico, of the *Forfeiture Order* issued November 3, 2006.¹ The *Forfeiture Order* imposed a monetary forfeiture in the amount of \$15,000 on A Radio for the willful violation of Sections 73.49 and 73.3526 of the Rules and the willful and repeated violation of Section 73.1350(a) of the Rules.² The noted violations involved A Radio's failure to enclose an antenna tower having radio frequency potential at the base within an effective locked fence, its failure to make available a complete public inspection file, and its failure to operate its station in accordance with the terms of its station authorization.

II. BACKGROUND

2. On August 25, 2005, in response to a complaint, resident agents from the Commission's San Juan Office of the Enforcement Bureau ("San Juan Office") conducted an inspection of station WEGA located in Vega Baja, Puerto Rico. Among other violations, the agents observed that the easternmost antenna structure, which had radio frequency potential at its base, was not enclosed within an effective locked fence. Moreover, the agents observed a sizable hole on the right side of the perimeter property fence, which would allow access to the property.

3. On October 25, 2005, a resident agent of the San Juan Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$15,000 to A Radio.³ A Radio filed a response to the NAL dated January 11, 2006. The Enforcement Bureau found no basis upon which to reduce the proposed

¹ *A Radio Company, Inc.*, Forfeiture Order, DA 06-2259 (Enf. Bur. South Central Region November 3, 2006) ("*Forfeiture Order*").

² 47 C.F.R. §§ 73.49, 73.1350(a), 73.3526.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632680001 (Enf. Bur., San Juan Office, released October 25, 2005).

forfeiture and issued the *Forfeiture Order*. On December 4, 2006, A Radio filed a petition for reconsideration of the *Forfeiture Order* requesting reduction or cancellation of the forfeiture associated with its violation of Section 73.49 of the Rules.

III. DISCUSSION

4. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁶ In examining A Radio's petition, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and any other such matters as justice may require.⁷

5. In its petition for reconsideration, A Radio admits that the easternmost antenna, which had radio frequency potential at its base,⁸ was not enclosed by an effective locked fence or a protective perimeter property fence. Nevertheless, A Radio asserts the forfeiture for this violation should be cancelled or reduced, because the tower was surrounded by a swamp more than 12 inches deep filled with crocodiles and leaches. A Radio also claims this swamp contains overflow from the local sewage treatment plant. A Radio states that this swamp makes accessing the tower very difficult and notes that the agents did not access the base of the tower. Finally, A Radio asserts that the Department of Natural Resources ("DNR") is presenting "obstacles" to construction of a fence, due to the swampy conditions. Citing *Buchanan Broadcasting, Inc.*,⁹ a case in which the Bureau reduced a forfeiture because "the muddy conditions around the base of the tower arguably impeded access, making the lack of effective fencing a less significant safety hazard," A Radio requests that the forfeiture be reduced or cancelled, because the swamp significantly impeded access to the tower and reduced the safety hazard posed by the lack of an individual tower fence.

6. It is undisputed that on August 25, 2005, A Radio was in violation of Section 73.49 of the Rules, because it failed to enclose an antenna tower having radio frequency potential at its base within an effective locked fence or protective perimeter property fence.¹⁰ We agree, however, that the flooding surrounding the antenna tower arguably created a semi-permanent barrier, impeding access to the tower,¹¹

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ A Radio states that the easternmost antenna is not in use and does not currently have radio frequency potential at its base, so it is not required to be enclosed within a locked fence. However, at the time of the inspection, the tower did have radio frequency at its base and was subject to Section 73.49 of the Rules.

⁹ *Buchanan Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 4360 (Enf. Bur. 2000).

¹⁰ A Radio also cites several cases in which forfeitures were issued when agents were able to access easily the base of the tower. The petition implies that if the agents did not access the tower base or could not easily access the tower base, the forfeiture should be reduced. Agents are not required to access towers having radio frequency potential at the bases for forfeitures to be issued. Agents must observe, however, that access is possible.

¹¹ We note that Section 73.49 of the Rules also states that "Ready access must be provided to each antenna tower base for meter reading and maintenance purposes at all times." If the flooding around the antenna tower significantly impeded access to the tower for meter reading and maintenance purposes, A Radio would also have been in violation of

thereby reducing the safety hazard posed by the lack of effective fencing.¹² We also note that A Radio's engineering consultant states in a sworn affidavit that the Department of Natural Resources is presenting "obstacles" to constructing a fence on this swampy area. Accordingly, based on the totality of the circumstances, we reduce the forfeiture associated with this violation to \$6,000.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Communications Act of 1934, as amended,¹³ and Section 1.106 of the Commission's Rules,¹⁴ A Radio, Inc.'s petition for reconsideration of the November 3, 2006 *Forfeiture Order* **IS** hereby **GRANTED IN PART** and **DENIED IN PART**.

8. **IT IS ALSO ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁵ A Radio, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of fourteen thousand dollars (\$14,000) for violation of Sections 73.49, 73.1350(a), and 73.3526 of the Rules.

9. Payment of the \$14,000 forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁶ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the "Federal Communications Commission." The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.¹⁷

this provision of Section 73.49. However, this violation was not cited in the *NAL*.

¹² The swamp, however, is not an absolute barrier to accessing the tower. According to a report written by the station's consulting engineer and dated May 21, 2005, the station's ground radial system was nonexistent at the time. The report stated "Hearsay has it that they were stolen."

¹³ 47 U.S.C. § 405.

¹⁴ 47 C.F.R. § 1.106.

¹⁵ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 73.49, 73.1350(a), 73.3526.

¹⁶ 47 U.S.C. § 504(a).

¹⁷ See 47 C.F.R. § 1.1914.

10. **IT IS FURTHER ORDERED** that this Order shall be sent by regular mail and by certified mail, return receipt requested, to A Radio, Inc. at its address of record; and an additional copy to A Radio's legal counsel, Audrey Rasmussen, Hall Estell Attorneys at Law, 1120 20th St. NW, Suite 700, North Building, Washington, DC 20036-3406.

FEDERAL COMMUNICATIONS COMMISSION

George R. Dillon
Assistant Chief, Enforcement Bureau